No. 431

IN THE

Supreme Court of the United States

OCTOBER 1943 TERM

VINCENT RAYMOND DUNNE, JAMES P. CANNON, EDWARD PALMQUIST, MAX GELDMAN, OSCAR COOVER, EMIL HANSEN, ALFRED RUSSELL, GRACE CARLSON, HARRY DEBOER, FARRELL DOBBS, FELIX MORROW, KARL B. KUEHN, JAKE COOPER, CARLOS HUDSON, CARL SKOGLUND, ALBERT GOLDMAN, CLARENCE HAMEL and OSCAR SCHOENFELD,

Petitioners,

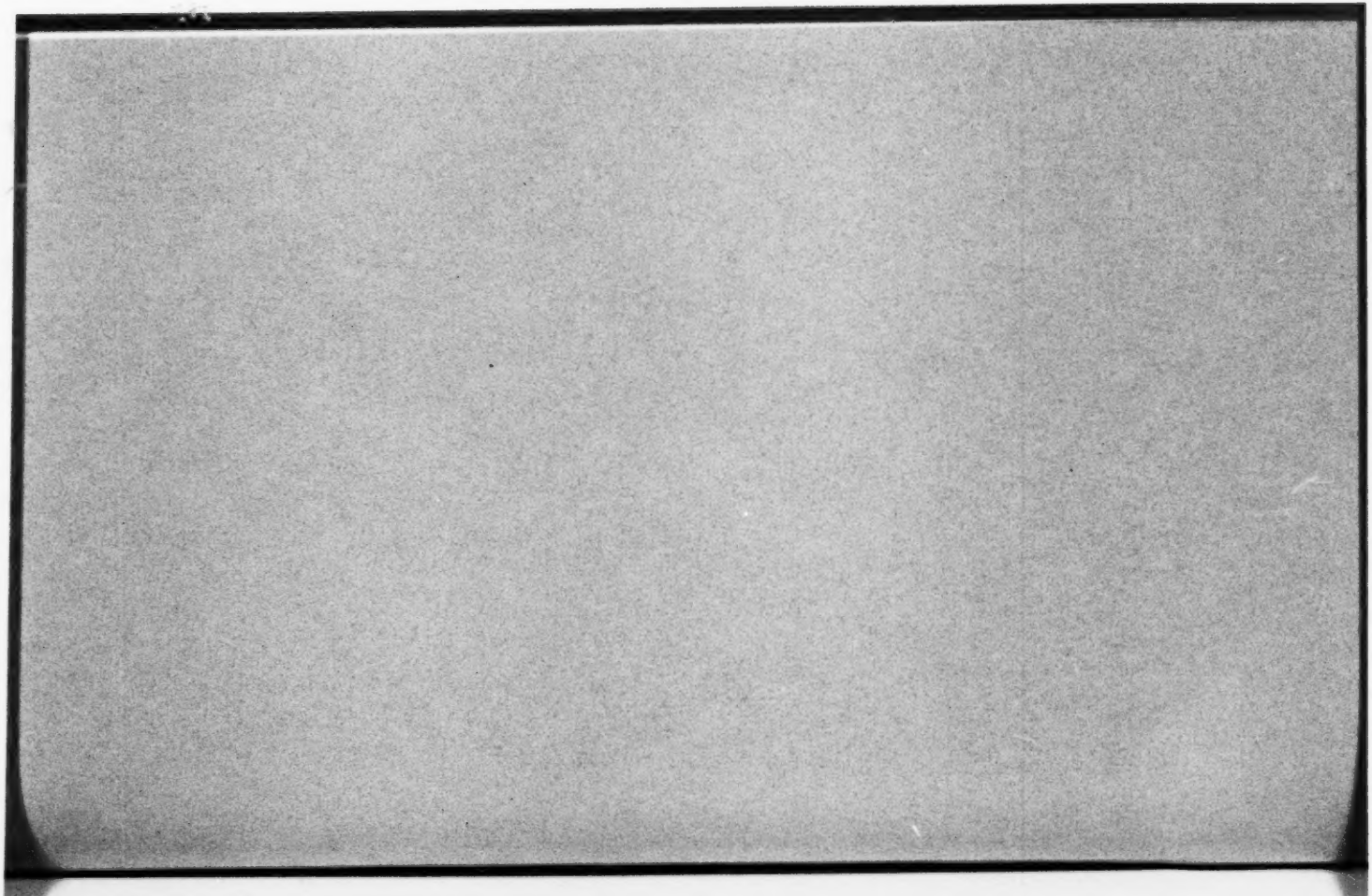
against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

OSMOND K. FRAENKEL,
ALBERT GOLDMAN,
Counsel for Petitioners.



INDEX

CASES CITED

STATUTES CITED

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court:

Vincent Raymond Dunne, James P. Cannon, Edward Palmquist, Max Geldman, Oscar Coover, Emil Hansen, Alfred Russell, Grace Carlson, Harry DeBoer, Farrell Dobbs, Felix Morrow, Karl B. Kuehn, Jake Cooper, Carlos Hudson, Carl Skoglund, Albert Goldman, Clarence Hamel and Oscar Schoenfeld, respectfully pray:

That a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Eighth Circuit affirming the judgment of the District Court of the United States for the District of Minnesota convicting petitioners of a violation of United States Code Title 18 §§9, 10 and 11.

Summary Statement

Petitioners were charged, in two counts, with having conspired to violate United States Code Title 18 §6 and United States Code Title 18 §§9, 10 and 11. They were acquitted of the charge contained in the first count which related to §6, the seditious conspiracy statute (35 Stat. 1089). They were convicted under the second count which was based on Title 1 of the Alien Registration Act of 1940 (54 Stat. 670). Section 11 of that statute punishes conspiracies to commit the acts prohibited by other sections of the law. The indictment here involved drew into question §§9 and 10. The first of these punishes anyone who advises or in any way causes insubordination in the armed forces in the United States; the second punishes anyone who advocates the overthrow of the Government by force. The sections are set forth in full in the appendix (pp. 27, 28).

Defendants demurred to each count of the indictment as insufficient in law, on the ground that the statute on which it was based was unconstitutional (R. 19-31). The demurrer was overruled and an exception allowed (R. 32).

Before the commencement of the trial the defendants filed a motion calling upon the Court to determine certain constitutional questions or, in the alternative, to order the jury to determine the same (R. 32-36). This application was denied and an exception allowed (R. 56).

Among the matters to which the Court's attention was directed, both in the demurrer and in the motion, was the applicability to this case of the "clear and present danger" rule. The same matter was called to the Court's attention at the end of the Government's case on motion for a directed verdict (R. 827, 829), which was followed by elaborate argument (R. 830-853). During the course of this argument, Mr. Schweinhaut, who was of counsel for the Government, stated that it was his opinion that the clear and present danger rule had no application to the case at all (R. 844).

The motion was denied, except as to five persons originally named as defendants, with an oral opinion (R. 854-856), and an exception noted on behalf of the other defendants (R. 857). The motion for a directed verdict was renewed at the end of the entire case on the same grounds, denied and an exception taken (R. 1129). Defendants also asked the Court to instruct the jury that there could be no conviction unless the jury found the existence of a clear and present danger (Requests Nos. 14, 15, R. 1132-1134). The Court refused to give these instructions and an exception was noted (R. 1143).

The various points heretofore discussed were all preserved in the assignments of error filed, particularly assignments Nos. 1, 2, 6 and 7 (R. 1274, 1279).

A large part of the trial was, of course, concerned with the question of defendants' guilt under the first count of the indictment, a question which, to some extent, involved considerations the same as those relating to the charge under the second count that defendants had conspired to advocate the overthrow of the Government by force. The Government proceeded almost entirely on the theory that proof of the defendants' guilt was established by proof of their membership in and activities in connection with the Socialist Workers Party. In an attempt to show that the defendants conspired to overthrow the Government by force, the Government introduced in evidence literature issued by the Socialist Workers Party or found in its headquarters, and also the testimony of witnesses about public speeches and private statements allegedly made by some of the defendants.

Although the defense challenged and denied the testimony of the Government's witnesses, the basic facts were undisputed. The existing disputes resulted from differences in interpretation of the documents published and the policies pursued by the party.

The Socialist Workers Party was organized at a convention held in Chicago, Illinois, from December 28, 1937

to January 1, 1938 (R. 861) at which was adopted a Constitution and Declaration of Principles (Government's Exhibit 1, set forth in full at R. 1176-1219) which is admittedly based on the teachings of Karl Marx, Frederick Engels, Nikolai Lenin and Leon Trotsky. At a special convention called in December, 1940, this Declaration of Principles was suspended; its circulation was then discontinued (R. 870, 903).

At the time of the trial the party had approximately 2,000 members (R. 931, 954) belonging to some thirty branches in different sections of the country, the three largest branches being in New York, Minneapolis and Chicago. The branches held meetings at which subjects of current interest were discussed, primarily from the point of view of the party (R. 891). Whenever and wherever possible the party has participated in election campaigns.

A National Committee of about twenty-five members, elected at a party convention, has charge of the functioning of the party during the intervals between conventions. In turn, it designates a small number (about seven) to act as members of a Political Committee, to manage the affairs of the party between sessions of the National Committee (R. 954).

New members are admitted to the party on application with the recommendation of two members and acceptance by the branch involved. They promise to accept the principles of the party and abide by its decisions (R. 1213-1214).

The party carried on its propaganda by the publication and sale of a weekly paper, *The Militant* (formerly the *Socialist Appeal*), and of a monthly magazine, the *Fourth International* (formerly the *New International*). The circulation of the weekly paper was about 15,000, and of the monthly magazine about 4,000 (R. 914). In addition, the party sold about 5,000 to 10,000 copies of the Declaration of Principles until its suspension in December, 1940, and published and sold various pamphlets (R. 914).

The Government proved that all of the defendants had been members of the Socialist Workers Party prior to

June 28, 1940, the date of the enactment of the Alien Registration Act of 1940, on which the judgment of conviction rests. Membership after that date was admitted by some of the defendants, disputed with regard to others, and completely unproven as to the rest. Almost all of the literature on which the Government based its case was published or distributed prior to the effective date of the statute in question.

Defendants in their motion for a directed verdict, directed the Court's attention to this phase of the case, claiming that the evidence was insufficient to show the existence of any conspiracy after the enactment of the statute, or the participation in that conspiracy of particular defendants. The same matter was also called to the Court's attention in requests to charge, particularly Nos. 12 and 13 (R. 1132) and No. 18 (R. 1134), which were refused and exception noted (R. 1143). These questions also were preserved in the assignments of error, particularly Nos. 2, 3, 4 and 9 (R. 1276-1281). It is significant in this connection to note also that the only reference in the lengthy charge of the Court to this important issue was the following:

> "And as to Count 2 it must be proved that they were members after June 28, 1940" (R. 1166).

Nothing was charged as to the necessity for finding that an unlawful conspiracy had been entered into after the enactment of the statute, and the jury no doubt was misled by the statement that if the jury found that the defendants conspired to impair the loyalty of the armed forces, they must be convicted (R. 1166)—without any caution that such conspiracy must be found to have been in existence after the enactment of the law.

The nature of the evidence relied upon by the Government to show the advocacy of unlawful overthrow of the Government and the promotion of disaffection in the armed forces will be discussed more fully in the accompanying brief.

The Circuit Court of Appeals, after holding the case for nearly ten months, unanimously affirmed the convictions in an opinion by Circuit Judge Stone. The Court held the statute constitutional, found the indictment sufficient and the clear and present danger rule inapplicable. It concluded that there was sufficient evidence of the existence of a conspiracy after the enactment of the act, and that the evidence connected each one of the convicted defendants with the conspiracy after that date. The Court did not discuss the instructions to the jury.

Jurisdiction

This Court has jurisdiction under Judicial Code §240 Subdivision "a". This application is timely since the decision of the Circuit Court of Appeals was rendered on September 20, 1943.

The opinion of the Circuit Court of Appeals has not been officially reported. It appears in the record at pages 1316 to 1344.

Questions Presented

1. The first question is whether or not §§9, 10 and 11 of the Alien Registration Act of 1940 operate as an unwarranted threat to freedom of speech, press and assembly in violation of Article 1 of the amendments to the Constitution of the United States.

2. The second question is whether the statute as applied violates Article 1 of the amendments to the Constitution because the facts proved failed to show the existence of any clear and present danger of the happening of the substantive evils which Congress sought to prevent and the Trial Court refused to permit the jury to pass on this issue.

3. The case also presents the question whether an indictment under this statute is sufficient when it merely repeats the words of the statute and fails to set forth the writings relied upon or any other facts showing the commission of a crime.

4. Finally, the case presents the question whether there was sufficient evidence to permit a conviction. This question falls into three parts: the first, whether the material relied upon by the Government to prove advocacy of forceful overthrow of the Government after the enactment of the statute is susceptible of such interpretation beyond a reasonable doubt; the second, whether there was any evidence of conspiracy to cause insubordination in the armed forces; the third, whether there was evidence sufficient to fasten guilt upon particular defendants, either by reason of their membership in the Socialist Workers Party after the enactment of the statute, or their knowledge that the aims of the Party were illegal.

Reasons Relied Upon for the Allowance of the Writ

1. There are here presented for decision several important questions of Federal law which have not been, but should be, settled by this Court, some questions which have been decided in a way probably in conflict with applicable decisions of this Court and some which are in conflict with decisions of other Circuit Courts of Appeal in the same matter.

2. This Court has never been called upon to pass upon the validity of a peacetime sedition statute. Indeed, this is the first time in our history since 1798 that such a statute has been enacted. While the constitutionality of the earlier law was never passed upon by this Court, it is well known that Thomas Jefferson believed it to be unconstitutional. Surely this Court should now hear argument on the important subject involved.

3. The applicability of the clear and present danger rule to a statute of this character is of the greatest importance. This Court in *Schenck* v. *United States,* 249 U. S. 47, held the test applicable to §3 of the Espionage Act (40 Stat. 219, 50 U. S. C. 33, 34). Section 9 of Title 18 of the U. S. Code is substantially identical with that section of the Espionage Act. The clear and present danger rule should, therefore, have been applied to so much of the case as rested on §9 and the refusal of the lower Courts to do so is in conflict with the law as laid down in this Court in the *Schenck* case and many others to which we will refer in the accompanying brief.

Moreover, by the recent decisions of this Court, the clear and present danger test is the "minimum" protection afforded to expression of opinion (see *Bridges* v. *California,* 314 U. S. 252). The Circuit Court of Appeals rested its decision upon *Gitlow* v. *New York,* 268 U. S. 652. While that case has never been overruled by this Court, the question is here presented whether it is applicable or whether the concurring opinion of Justices Brandeis and Holmes in *Whitney* v. *California,* 274 U. S. 357, does not correctly represent the law. Namely, that regardless of a legislative declaration that certain words are dangerous, a defendant in a particular case always has the right to a determination by the Court or by the jury that under the circumstances of his case no clear and present danger existed. See in this connection also *Schneiderman* v. *United States,* 319 U. S. ....., and *Taylor* v. *Mississippi,* 319 U. S. .....

4. The Circuit Court of Appeals for the Eighth Circuit in deciding that the indictment is sufficient has decided an important question of Federal law contrary to decisions of this Court and in conflict with decisions of other circuits. See *United States* v. *Hess,* 124 U. S. 483; *Collins* v. *United States,* 253 Fed. 609 (9th Cir.); *Asgill* v. *United States,* 60 F. 2nd 780 (4th Cir.).

5. The decision that the evidence relied on by the Government is sufficient to justify the finding of guilt beyond a reasonable doubt presents an important question never before decided by this Court. Substantially the question whether the Socialist Workers Party advocates the overthrow of the Government by force is the same as whether the Communist Party so advocates. This latter question was recently before the Court in the *Schneiderman* case, *supra*. At that time the Court did not feel it necessary to reach a decision. In the case at bar the question is presented under a slightly different aspect. Its importance cannot be doubted.

6. There is also the question whether the evidence, particularly in the light of the Court's charge, justified a conviction of any or all of the defendants, in view of the fact that the statute under which they were convicted was enacted only in June, 1940, and the great bulk of the evidence, most of which was introduced as relevant under the first count, dealt with matters which preceded that date. The right of a person not to be convicted for acts committed prior to the enactment of a criminal law is fundamental and is specifically guaranteed by the Constitution. It should not be whittled away by presumptions or inferences. The question to be presented here is of the first importance in the administration of American justice.

7. There is finally the question whether there is sufficient evidence to justify the conviction of various of the defendants even though it appears that their membership in the Socialist Workers Party continued after the enactment of the statute in June, 1940, in the absence of any evidence that they interpreted the program of the Party as advocating the violent overthrow of the Government or any other unlawful act. See *Schneiderman* v. *United States*, *supra*.

WHEREFORE, it is respectfully prayed that a writ of certiorari be issued out of the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding that Court to certify and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, and it is further prayed that the order of said Circuit Court of Appeals for the Eighth Circuit affirming the judgment of conviction of the District Court for the District of Minnesota be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as this Honorable Court may deem just and proper, and your petitioners will ever pray.

Dated, October 14, 1943.

VINCENT RAYMOND DUNNE, JAMES P. CANNON, EDWARD PALMQUIST, MAX GELDMAN, OSCAR COOVER, EMIL HANSEN, ALFRED RUSSELL, GRACE CARLSON, HARRY DEBOER, FARRELL DOBBS, FELIX MORROW, KARL B. KUEHN, JAKE COOPER, CARLOS HUDSON, CARL SKOGLUND, ALBERT GOLDMAN, CLARENCE HAMEL and OSCAR SCHOENFELD,

By OSMOND K. FRAENKEL and ALBERT GOLDMAN,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION

Statement

The basic facts are set forth in the foregoing petition. So far as may be necessary, further facts will be discussed in connection with the argument.

Argument

POINT I

The statute upon which the conviction rests is unconstitutional as denying freedom of speech.

The indictment charged petitioners with a conspiracy to violate two separate sections of the statute, §§ 9 and 10. The first of these punishes the fomenting of disaffection in the armed forces; the second, the advocacy of the overthrow of the Government by force. They require separate consideration.

Disaffection in the armed forces

This provision of the statute is substantially identical with § 3 of the Espionage Act (40 Stat. 219, 50 U. S. C. 33). That statute has, of course, been upheld by this Court in various decisions beginning with *Schenck* v. *United States,* 249 U. S. 47. However, it must be borne in mind that the Espionage Act is applicable only during a time of war, whereas the present statute is applicable regardless of a state of war. The impact of war upon the validity of the statute was recognized by Mr. Justice Holmes when he said:

> "When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long

as men fight and that no court could regard them as protected by any constitutional rights" (249 U. S. at 52).

The Circuit Court of Appeals was of the opinion that the circumstance that the earlier statute was a wartime statute was immaterial, particularly in view of the fact that the present statute was enacted "on the brink of war, and to correct existing dangers". We respectfully submit that the distinction between peace and war is still a vital one and that the validity of the new statute is one which should be fully explored before this Court in argument.

In this connection we wish to call the Court's attention to Prof. Chafee's analysis of the decisions under the earlier statute and his conclusion of the harmful character even of that law during war time. (See Free Speech in the United States, 51-53, 94, 461.) He pointed out that the earlier statute was enforced in such a manner as to throttle discussion and concluded that this throttling of discussion during the war had a serious and perhaps decisive effect upon the attitude of public opinion in connection with the peace. (See pages 561 and following.) Whatever may be said about the propriety of restricting discussion during wartime there can be no justification for such restrictions in the period before the war. It is of the utmost importance that the fullest freedom of discussion be permitted during a period when it becomes apparent that the question of war or peace will be an important one. The statute at bar is a threat to such freedom of discussion, of the same general kind as was condemned by this Court in *Herndon* v. *Lowry,* 301 U. S. 242, and *Thornhill* v. *Alabama,* 310 U. S. 88.

Forcible overthrow of the Government

This Court has, of course, upheld state statutes similar to the statute here in question. See *Gitlow* v. *New York,* 268 U. S. 652, and *Whitney* v. *California,* 274 U. S. 357. But in dealing with these statutes this Court was limited to

a consideration of the question whether or not they violated the due process clause of the Fourteenth Amendment. Here this Court is concerned with the more direct question whether the Congressional enactment violates the First Amendment's absolute prohibition against "abridging" freedom of speech or of the press. This Court has never been called upon to consider that question.

It should be borne in mind, moreover, that the statute is not limited either to conditions of war or to circumstances of a clear and present danger, a question which will be discussed in the succeeding point. Moreover, Subsection 3 of § 10 punishes mere membership in an organization which advocates the proscribed doctrine. Thus one may be punished for the acts and beliefs of another. This Court has repeatedly held that that cannot be done. See *deJonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359; *Schneiderman* v. *United States*, 319 U. S. .

POINT II

The statute as applied is invalid because there was no evidence of the existence of any clear and present danger of the forcible overthrow of the Government.

As we have already pointed out, petitioners sought to have the Trial Court apply the clear and present danger test by motion before trial, by motions at the end of the Government's case and at the end of the entire case, and by requests to charge. In the argument on the motion to dismiss, the Government's representative at the trial said:

> "It is not the contention of the government that there was a clear and present danger that these defendants could have succeeded in overthrowing the government by force. It is our contention that under the law it is not necessary to show that there was a clear and present danger of the success of their undertaking" (R. 844).

The Trial Court expressed the opinion that Congress had given cognizance to "clear and present dangers" (R. 854). The Circuit Court of Appeals thought the question governed by the *Gitlow* case, 268 U. S. 652.

We submit that the *Gitlow* case is not applicable to § 9 of the statute in question, a point urged on the Circuit Court of Appeals which it did not discuss. Moreover, we believe that this Court has departed from the view announced in the *Gitlow* case and has shown an indication of accepting the views expressed in the concurring opinion of Justices Brandeis and Holmes in *Whitney* v. *California*, 274 U. S. 357 at .....

Certainly the clear and present danger test has been stressed in all of the recent decisions of this Court culminating with the statement in *Bridges* v. *California*, 314 U. S. 252, that it constitutes the minimum protection to freedom of expression. And in *Schneiderman* v. *United States*, 319 U. S. , Mr. Justice Murphy, speaking for a majority of the Court, pointed out the difference between agitation calling for violent action "which creates a clear and present danger of public disorder or other substantive evil" and advocacy even of the use of force under hypothetical conditions at a future time. And in making that statement Mr. Justice Murphy expressly relied upon the concurring opinion in the *Whitney* case above referred to.

Indeed, in *Taylor* v. *Mississippi*, 319 U. S. ....., this Court unanimously reversed a state court conviction under a statute which punished words "designed to encourage violence" on the ground that no clear and present danger was threatened.

It is significant, moreover, that even before the last two cases cited were decided by this Court the Court of Criminal Appeals of Oklahoma reversed convictions under that State's Criminal Syndicalism Act because the clear and present danger test had not been applied in the prosecution. In *Shaw* v. *State*, 134 P. (2nd) 999, the Court said at page 1019:

"It is our conclusion that the Legislature in the first instance has found that certain utterances by their very nature threaten the existing government. That notwithstanding this legislative declaration, especially in view of decisions of the Supreme Court of the United States, hereinabove cited, that a defendant being tried on a charge of being a member of an organization advocating criminal syndicalism has a right to have submitted to the jury as a question for their determination whether the principles alleged to have been advocated by the organization are such as to present a real and imminent danger of violence, sabotage or unlawful acts against our government. * * * The jury should have been instructed that they must find beyond a reasonable doubt. * * * that such advocacy was likely to result within the immediate future in the commission of serious violence or other unlawful acts for the purpose of bringing about political or industrial change or revolution by such means."

See also *Klapprott* v. *State*, 127 N. J. L. 395.

We believe that the above quotation substantially represents the law implicit in the recent rulings of this Court, which should now be made explicit in the pending case. In the case at bar it is conceded that there was no evidence justifying a conclusion that there was any clear and present danger that petitioners could have brought about the overthrow of the Government by force. Consequently there was no constitutional justification for any prosecution for a conspiracy to overthrow the Government by force and the motion to dismiss should have been granted.

It is true that the Government did not concede a similar absence of evidence of a clear and present danger on the other aspect of the case, namely, the question of causing insubordination in the armed forces (R. 844, 845). Hereafter we shall argue that there was no evidence either of a conspiracy to cause disaffection or of clear and present danger that such disaffection could have resulted. Here we shall merely urge that as to this phase of the case the